



STATE OF NEW JERSEY

**FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION**

In the Matters of Y.N., *et al.*,
Department of Transportation

Discrimination Appeals

CSC Docket Nos. 2018-766, *et al.*

ISSUED: APRIL 6, 2018

Y.N., a Senior Engineer Structural Evaluation with the Department of Transportation (Transportation), appeals the determination of the Deputy Commissioner, which substantiated, in part, allegations that he had been subjected to violations of the New Jersey State Policy Prohibiting Discrimination in the Workplace (State Policy). G.R., a member of the Senior Executive Service, and J.E., a Supervising Engineer II, Structural Engineering, appeal the respective determinations of the Deputy Commissioner, which found sufficient evidence that they had violated the State Policy. These appeals have been consolidated due to common issues presented.

Y.N., an African-American, filed a complaint with the Division of Civil Rights and Affirmative Action (DCR/AA) on or about August 3, 2016 alleging discrimination on the bases of age, race, disability and retaliation against G.R., a Caucasian; J.E., a Caucasian; H.B., Project Engineer Structural Evaluation, an Asian; and M.K., Supervising Engineer, Structural Evaluation, an Asian. Y.N. alleged race discrimination during a meeting when J.E. asked him, "Are you going to [DCR/AA] because you are black?" In addition, Y.N. alleged being subjected to multiple acts of retaliation after he assisted a co-worker with a discrimination complaint. Specifically, he alleged that management restricted his overtime; required him to notify his supervisor when he arrived and left via daily e-mail; questioned his use of benefit time; required him to submit daily work logs; initiated discipline for a false list of insubordinate behaviors; forced him to violate safety regulations on bridge inspections; subjected him to last minute field changes; deliberately sat him away from his team; and did not provide him a work items

checklist when new quads were built. Y.N. claimed that although a requested wall installation that matched other team leaders was installed, it was later removed without notice of the reason. DCR/AA also investigated Y.N.'s allegations of age and disability discrimination raised in a complaint filed with the Equal Employment Opportunity Commission. Specifically, Y.N. alleged disability discrimination because H.B. attempted to reject his request for a stand-alone desk and age discrimination when J.E. referenced working at Transportation before Y.N. entered college.

DCR/AA's Investigation

DCR/AA's investigation, during which many individuals were interviewed and documentation was reviewed, substantiated Y.N.'s allegations in part. Specifically, J.E. acknowledged asking Y.N., "Are you going to [DCR/AA] because you are black?" at a meeting on August 2, 2016 when G.R. and J.E. attempted to have Y.N. sign for receipt of a counseling memo. DCR/AA determined that it was inappropriate for J.E. to question Y.N.'s motives in going to DCR/AA based on any protected category of which Y.N. is a member. Moreover, it noted that the manner and context of the question was demeaning, especially from a supervisor, even if that was not J.E.'s intent. DCR/AA noted that under the State Policy, supervisors must maintain a work environment free from any form of prohibited discrimination/harassment. Their conduct should be behavior for employees to emulate, and they should promote an environment of respect and inclusion. Moreover, the State Policy is a zero tolerance one in which a violation can occur without discriminatory intent. However, the investigation revealed nothing else to indicate that any of the respondents treated Y.N. differently based on race.

In addition, the investigation substantiated Y.N.'s retaliation allegations in part. Specifically, DCR/AA found that Y.N. engaged in a protected activity when he contacted management to report an alleged discriminatory practice against S.O., an Assistant Engineer, Transportation. Y.N. stated that he was assisting S.O. when he spoke to G.R., J.E. and M.K., and alleged that he was subsequently subjected to discipline. G.R., J.E. and M.K. stated that Y.N. not only consulted an employee on a disciplinary matter but also attempted to participate in meetings representing himself as a representative of the DCR/AA Internal Equal Employment Opportunity (EEO) Unit and union representative on S.O.'s behalf. DCR/AA determined that while it was appropriate and necessary for G.R. and J.E. to address any insubordinate behavior or performance concerns, such incidents should have been addressed when they occurred. Both G.R. and J.E. stated that they knew of concerns with Y.N.'s behavior/performance prior to his engaging in the protected activity. G.R. and J.E. admitted that Y.N. demonstrated these behaviors prior to his provisional appointment to the title of Principal Engineer Structural Evaluation

in October 2015.¹ However, it was not until Y.N. engaged in the protected activity that G.R and J.E. tried to initiate progressive discipline, with the primary reason cited being Y.N.'s misrepresentation of his role on the EEO Advisory Committee and as a union representative, on one or more occasion, either by actual statement or implied language. Nevertheless, G.R. and J.E. failed to provide any other instances of Y.N.'s alleged misrepresentation. They only identified the one incident involving S.O. Human Resources advised G.R and J.E. on a Corrective Action Plan providing a clean slate for Y.N. for any incidents prior to April 11, 2017 because of management's failure to document specific incidents of performance concerns in the past. DCR/AA determined that G.R. and J.E.'s recommendation for discipline relating to Y.N.'s protected activity demonstrated retaliation and was a State Policy violation. However, Human Resources appropriately stopped any retaliatory actions constituting an adverse employment action against Y.N. from occurring.²

DCR/AA noted that many of the other issues raised by Y.N. were unsubstantiated as instances of race discrimination and retaliation but rather had legitimate business reasons. In this regard, several witnesses described being subjected to last minute field changes like Y.N. In addition, witnesses described differing scenarios in which the number and level of engineers required to inspect bridges was determined by the circumstances and type of bridge. There was no evidence that Y.N. was forced to violate safety regulations on bridge inspections. The investigation also confirmed that Y.N. was seated away from his team because there were no other available quads. Further, management requested that a wall be installed at his workstation. The wall was installed but later had to be removed due to the Fire Marshal's regulations. In addition, a witness confirmed that Y.N. was provided a work items checklist when new quads were built, but because he had not submitted the work items checklist by the requested deadline, the manager chose metal cabinets for Y.N.

The investigation revealed that Y.N.'s overtime was restricted after he was requested to provide justification after recording 40 hours of overtime in one pay period. Y.N. initially refused to provide documentation, resulting in his timesheets not being approved for approximately three months. Since Y.N. could justify only 27 of the 40 overtime hours, management's decision to monitor and/or restrict his overtime was justified.

The requirement that Y.N. notify his supervisor via e-mail when arriving and leaving was not retaliatory. The investigation verified that Employee Relations

¹ Y.N. received a provisional appointment to the title of Principal Engineer Structural Evaluation, effective October 31, 2015, and was returned to his permanent title of Senior Engineer Structural Evaluation, effective July 22, 2017.

² Since the investigation substantiated allegations against G.R and J.E., DCR/AA referred those issues for administrative action. Transportation issued G.R. and J.E. written warnings, which are not considered disciplinary actions. See *N.J.A.C. 4A:2-2.1 et seq.* and *N.J.A.C. 4A:2-3.1 et seq.*

advised management to require these e-mails in an effort to monitor his time because questions were raised regarding his accountability with time after he failed to attend a meeting and was not in the field as scheduled. Management requested that Y.N. charge benefit time for the absence, but he refused. Documents also revealed that Y.N. often requested benefit time in the electronic Cost Accounting and Timesheet System (eCATS) but failed to advise his direct supervisor or wait for his leave to be approved. When directed to follow procedure, Y.N. opted to send his leave request to another Supervising Engineer to whom he did not report. These circumstances demonstrated continuing insubordinate behavior and a legitimate need for management to address these behaviors.

The investigation confirmed supervisors are responsible for notifying their Personnel Coordinators of employee benefit time and submitting a pattern of exhaustion to Human Resources. In accordance with Transportation policy, supervisors may request that an employee submit acceptable medical documentation under specific circumstances, including chronic or excessive absenteeism; use of 15 days in a 12-month period; or a pattern of absences, such as days after holidays or every Friday/Monday. Documents reviewed revealed that Y.N. was not the only employee to exhaust his sick time before the end of the calendar year; however, the other employee's Team Leader reported to a different supervisor who then retired. Although Y.N. applied for and was approved for leave under the federal Family and Medical Leave Act (FMLA), that approval did not excuse Y.N. from exhausting his benefit time prior to his request.

The investigation did not substantiate Y.N.'s allegations of disability discrimination. Y.N. requested a stand-alone desk through the Americans with Disabilities Act (ADA) to accommodate his disability. H.B. attempted to reject the request after Y.N. had already followed proper procedure and been in contact with the ADA Coordinator. The investigation revealed that H.B. was unaware of Y.N.'s disability but was attempting to address his unauthorized request for work-related items. H.B. assumed the request for a stand-alone desk also needed his approval as he was Y.N.'s supervisor at the time. Subsequently, H.B. admitted he realized he was not supposed to respond to Y.N.'s ADA request.

The investigation also did not substantiate Y.N.'s allegation of age discrimination when J.E. referenced working for Transportation before Y.N. entered college. DCR/AA reviewed the e-mail exchange and could not substantiate age discrimination. In an e-mail, J.E. asked Y.N. to identify a work location for files. Y.N.'s response, "I know from experience who I am dealing with," was contrary and irrelevant to the question. J.E.'s response, "Who you are working with is someone who has been a Supervising Engineer since before you joined the Department, probably even before you went to college," recounted his years of experience and was not in reference to Y.N.'s age.

DCR/AA further noted that the investigation did not substantiate any allegations against M.K. M.K. was not involved in any written disciplines nor did he have any supervisory authority over Y.N. The investigation also did not substantiate the allegations against H.B. H.B. admitted stating, “[Y.N.,] the 40 hours overtime is a piece of bullshit and I cannot supervise you.” DCR/AA stated that this statement was inappropriate for a supervisor, but it did not implicate the State Policy. Documents revealed that H.B. was not involved in the counseling memo regarding Y.N.’s alleged misrepresentation. Transportation issued its determinations on August 30, 2017.

Appeal of Complainant Y.N.

On appeal to the Civil Service Commission (Commission), Y.N. states that the determinations were issued well after 120 days from his filing of the complaint plus all the extensions Transportation requested. Regarding the merits, Y.N. argues that he had made DCR/AA aware of the following events but it did not discuss them in its determination: (1) “falsification” of his interim Performance Assessment Review (PAR) in May 2017; (2) supervisor changes; (3) “unjustified” pending disciplines; (4) his return to his permanent title; (5) an “unjustified” pay cut; (6) rejection of his request for reassignment to a position in the Division of Construction Services and Materials; (7) “fabrication” of a discrimination complaint by a former subordinate; (8) cessation of his sick time benefit even when he was approved for FMLA; (9) his ability to use sick time restricted for more than three months; and (10) workplace violence. In support, Y.N. submits various documents, including e-mail correspondence. Y.N. requests a hearing in this matter.

Appeal of Respondent G.R.

G.R. states that during an incident in early July 2016, Y.N. presented himself as a DCR/AA and union representative. G.R. told Y.N. that he thought this to be inappropriate. G.R. states that he met with Linda Legge, DCR/AA Director, to explain what transpired and to ascertain Y.N.’s role. In a July 7, 2016 e-mail, Legge listed the differences in responsibilities between a member of the EEO Advisory Committee, Y.N.’s role, and staff in the DCR/AA Internal EEO Unit. G.R. highlights that Legge indicated that:

[EEO Advisory Committee] members are not authorized to be representatives for individuals who may have a [DCR/AA] complaint, nor are they authorized to coach and counsel individuals on [Equal Employment Opportunity/Affirmative Action] matters.

G.R. states that Legge then met with Y.N. on July 19, 2016 and clearly explained to him his role on the EEO Advisory Committee and that it is inappropriate to misrepresent that role. On August 2, 2016, G.R. met with Y.N. to counsel him

regarding this particular issue. G.R. maintains that he did not discipline Y.N. but rather prepared the counseling memo, which was not copied to anyone. Thus, G.R. argues that he did not retaliate against Y.N. but simply had a conversation regarding his role on the EEO Advisory Committee. G.R. further contends that the problems with Y.N. started in November 2016 and escalated in the following months. G.R. states that after being notified by letter on January 25, 2017 that a discrimination complaint had been filed against him, he had some concerns regarding the letter's instruction that retaliation was prohibited. Specifically, G.R. states that as there were several issues that required initiation of disciplinary action, he was concerned that such action would be perceived as retaliatory; however, G.R. states that he believed he had legitimate business reasons to initiate discipline. In support, G.R. submits Legge's July 7, 2016 e-mail; Legge's July 19, 2016 e-mail that described her meeting with Y.N.; and the August 2, 2016 counseling memo, which was from G.R. and J.E. It is noted that the counseling memo begins as follows:

[Y.N.],

The primary issue of concern is a pattern of Insubordination. The pattern actually goes back long term, but a couple of recent incidents brought this to a head.

Several situations were discussed in varying levels of detail.

The primary one that prompted the Counseling was that you misrepresented on more than one occasion, either by implied language or actual statement, your roles with one or both of the following two organizations: CWA Shop Steward, Member of [the EEO Advisory Committee]. This has resulted in a significant disruption to the Bureau – a situation we discussed in length. Linda Legge met with you on July 19th and discussed your role with the [EEO Advisory Committee], clearly defined the limits of that role, and how important it was that you not allow any misunderstanding to occur with regards to your role with that group.

In addition, we went over several other examples of action that could be perceived as insubordinate.

The counseling memo ends as follows:

At the end, we were comfortable that you indicated a willingness to work through your supervisor and avoid the behaviors that had prompted the Counseling to begin with. At the same time, at the beginning of the meeting, we did provide a copy of the Guidelines for

Discipline, to which you commented you were already aware of. Our hope and expectation is that future incidents of insubordination will not occur.

Appeal of Respondent J.E.

J.E. contends that the determination did not explain the context of his question, "Are you going to [DCR/AA] because you are black?" Specifically, he states that he and G.R. presented Y.N. with the August 2, 2016 counseling memo and requested that Y.N. sign for receipt. Y.N. refused and eventually stated that he was going to DCR/AA. J.E. and G.R. asked why, and Y.N.'s responses did not seem "rational." J.E. states that he and G.R. were puzzled. They attempted to understand and help Y.N. clarify his thinking by asking him a number of questions. J.E. states that the question, "Are you going to [DCR/AA] because you are black?" was one of many he posed. J.E. states that Y.N. did not seem fazed by the question and never verbalized a rational reason as to why he felt it necessary to go to DCR/AA. J.E. states that he and G.R. were being very gentle and simply trying to help Y.N. realize that there did not seem to be any rationality behind his statement that he was going to DCR/AA because he was asked to sign for receipt of the counseling memo. He maintains that the question was not a demeaning reference to Y.N.'s race.

With respect to retaliation, J.E. states that the situation started when G.R. asked him to speak with Y.N. about a disturbance in another unit in early July 2016. During the conversation, Y.N. revealed that he was an "EEO representative" and union shop steward, and J.E. answered that he was unaware that Y.N. held these roles. J.E. states that he asked if Y.N. understood the limits of his responsibilities in these roles and Y.N. responded that he did. J.E. states that he accepted Y.N.'s statements for the moment and did not challenge them; rather, J.E. advised Y.N. that if he was acting in one of these roles, he should state which "hat" he was wearing when he spoke with someone. J.E. states that later that morning, Y.N. went to M.K.'s cube with S.O. in tow. A commotion followed, M.K. walked into G.R.'s office, and J.E. followed. M.K. explained that Y.N. had tried to represent himself as a "member of the EEO." J.E. states that Y.N. was brought into the room, partly because Y.N. wanted to meet with them and partly to discuss his actions regarding his "representing" another employee. J.E. states that Y.N. "wanted to talk about discrimination against [S.O.]," but they were focusing on Y.N. J.E. states that as they challenged Y.N.'s authority, Y.N.'s description of his authority shrank. J.E. argues that it is fine for an employee to speak on behalf of another employee if it is okay with the other employee; however, in early July 2016, Y.N. was attempting to use authority he lacked to speak to management and supervisors. Eventually, Y.N. stated that he was on "a Committee" and could offer it comments about Transportation. In her July 19, 2016 e-mail, Legge stated that Y.N. was part of the EEO Advisory Committee and that he was not to misrepresent his role in

that capacity. J.E. states that the preceding events occurred in the weeks before the August 2, 2016 meeting when he and G.R. asked Y.N. to sign for receipt of the counseling memo. J.E. argues that DCR/AA's determination ignores the fact that Y.N. was misrepresenting himself and that this was the context for the August 2, 2016 meeting. He questions what Y.N.'s protected activity was and whether the determination indicates that simply knowing of an allegation of discrimination is sufficient proof of retaliation.

J.E. contends that the determination suggests that Y.N. could not be disciplined for insubordination once he brought up an allegation of a discriminatory practice against another employee, a protected activity, with another supervisor since he, J.E., knew about it. J.E. argues that he did not "fail to address [Y.N.'s] behavior" but was in fact addressing his behavior in the moment as directed by G.R. since Y.N. was J.E.'s indirect subordinate. J.E. argues that the determination interferes with supervisory activities and does not take into account that the manner in which Y.N. proceeded with protected activity was extremely disruptive to operations. J.E. maintains that it was Y.N.'s multiple insubordinations involving P.L., Project Engineer Structural, Transportation, S.O.'s supervisor, that triggered this situation. J.E. maintains that Y.N. demonstrated insubordinate behavior prior to October 2015, such as stating that he would "never work for a woman," and that he attempted to handle that behavior with guidance, discussion and informal counseling; as such, he did not "fail to address" the behavior. J.E. states that Y.N.'s behaviors prior to October 2015 were less overt and he had not been directly insubordinate to J.E.; however, the behavior worsened over time until more formal action was needed. J.E. emphasizes that the *progressive* discipline initiated was based on a series of insubordinate behaviors and that he did not recommend such action until Y.N. exhibited insubordinate behavior in a March 2017 e-mail string. J.E. argues that this was not a case of unjustified adverse action but a case of valid progressive corrective action for insubordination and misrepresentation. Y.N. was not claiming discrimination against himself and had not testified in an investigation. Y.N. also did not have a "thorough" conversation with J.E. regarding the issues with S.O. J.E. asserts that in the train of thought presented in the determination, an employee cannot be disciplined once he misrepresents himself as an "EEO representative." J.E. states that he has never seen the Corrective Action Plan providing a clean slate for Y.N. for any incidents prior to April 11, 2017 because of management's failure to document specific incidents of performance concerns in the past. He argues that in meeting with Y.N. in August 2016, management *was* documenting the specific incident in the current matter in order to establish a record of his behavior. In support, J.E. submits a copy of the March 2017 e-mail string, among other documents.

DCR/AA's Response

In response to Y.N., DCR/AA states, with respect to the length of the investigation, that it began a preliminary investigation and an attempt at mediation; however, all parties involved were not willing to participate. On or about January 13, 2017, it was determined to conduct a formal investigation. DCR/AA also states that it received a “plethora” of e-mails from Y.N., many of which raised new allegations. DCR/AA states that it was obligated to review all new allegations and determine if any implicated the State Policy.

With respect to the merits, DCR/AA responds to each of the ten “missing facts” identified by Y.N. as follows. With respect to the May 2017 interim PAR, H.B. requested Y.N.'s signature to confirm the face-to-face meeting on May 29, 2017. As they had not met that day, Y.N. refused to sign; however, it was confirmed that they met on May 30, 2017. DCR/AA states that the electronic PAR system automatically generates a date for the face-to-face meeting upon the supervisor's submittal of the rating, but the generated date may not always be the date the actual meeting occurred. It is also not unusual for PARs not to be completed in accordance with the scheduled timeframe. DCR/AA determined this to be the usual business practice and devoid of discriminatory animus. Regarding Y.N.'s supervisor changes, DCR/AA states that Y.N. was reassigned to H.B. upon his provisional appointment to the title of Principal Engineer Structural Evaluation in October 2015 because Principal Engineers are supervised by Project Engineers. H.B. stated that he could no longer supervise Y.N. after becoming disheartened by events, and Y.N. was reassigned to I.A., Project Engineer Structural Evaluation, in December 2016. On Y.N.'s pending disciplines, his return to his permanent title, and pay cut, DCR/AA states that Y.N.'s allegations regarding these issues are being addressed in its investigation of a separate complaint Y.N. filed against I.A. DCR/AA also reiterates that Y.N. was placed on a Corrective Action Plan on April 11, 2017 and provided a clean slate. It states that the currently pending disciplines are post-commencement of the Corrective Action Plan and not retaliatory. Regarding Y.N.'s requested reassignment to a position in the Division of Construction Services and Materials, it was determined that the totality of Y.N.'s skillset did not meet the necessary qualifications; however, Y.N. was provided with feedback and suggestions to enhance his skills. With respect to the discrimination complaint filed by Y.N.'s former subordinate, DCR/AA states that its investigation did not substantiate any State Policy violation. However, the matter was referred to Human Resources because it was determined that Y.N. had scrutinized his subordinates' timesheets and made them adhere to an attendance policy that management only intended to be applied to Y.N. based on his previous attendance pattern. Regarding sick time, DCR/AA reiterates that although Y.N. was approved for FMLA leave, such approval did not excuse his earlier exhaustion of his benefit time. In addition, Y.N.'s timesheets were in draft until his overtime approval was resolved. Y.N. was asked to provide documentation for his overtime, but he initially refused. This resulted in

his timesheets not being approved for approximately three months. Due to technical issues, Y.N. was unable to submit leave requests. Although Y.N. was unable to view his benefit time for the new calendar year in eCATS, he was not restricted from using his time. Further, DCR/AA states that Y.N.'s allegation of workplace violence was not within its remit, and it advised him to file a report with Transportation's Office of the Inspector General. DCR/AA maintains that its investigation properly substantiated Y.N.'s allegations in part only.

In response to G.R. and J.E., DCR/AA states that Legge initially met with the respondents when they contacted her to advise that Y.N.'s behavior was creating a "toxic" environment and making staff feel uncomfortable. They believed that Y.N. was misrepresenting his role on the EEO Advisory Committee. Legge noted that that management's solution was for her to kick Y.N. off the EEO Advisory Committee, but she expressed her reluctance to do so since Y.N. was doing a good job with his work for the EEO Advisory Committee. Legge agreed to meet with Y.N. and discuss his understanding of his role on the EEO Advisory Committee. At their meeting on July 19, 2016, they discussed his role on the EEO Advisory Committee and how it differed from the role of staff in the DCR/AA Internal EEO Unit. DCR/AA states that Legge's meeting with Y.N. was a discussion, not counseling. Legge recalled that Y.N. stated his understanding and he specifically told others that he was not a part of DCR/AA but a member of the EEO Advisory Committee. DCR/AA notes that the August 2, 2016 counseling memo indicated that the primary reason that prompted the counseling was that Y.N. misrepresented himself on more than one occasion as a member of the EEO Advisory Committee and a union representative. However, G.R. and J.E. failed to disclose any other incidents related to Y.N.'s alleged misrepresentation and only identified the incident involving Y.N. reporting concerns about S.O. The counseling memo also noted Y.N.'s pattern of insubordination; however, there was no documentation regarding the previous behavior. DCR/AA notes that in his appeal, J.E. acknowledges that Y.N.'s behavior prior to October 2015 was insubordinate in nature and he attempted to handle it informally. DCR/AA states that the investigation confirmed that a request for discipline was submitted on February 1, 2017 that included attachments listing "Manager's Account of Events Leading to Proposed Disciplines." Following those events, five issues concerning Y.N. were listed. The fifth issue listed indicated that Y.N. was in violation when he misrepresented his role on the EEO Advisory Committee. The August 2, 2016 counseling memo, which cited Y.N.'s alleged misrepresentation and insubordinate behaviors, was attached. DCR/AA reiterates that the timing of the recommended discipline, which was primarily based on Y.N.'s misrepresentation of his authority, was suspect and demonstrated retaliation. DCR/AA adds that following the commencement of the Corrective Action Plan, Y.N. received a written warning on April 28, 2017; a proposed five-day suspension for insubordination and other sufficient cause on June 15, 2017; a proposed 10-day suspension for insubordination on July 7, 2017; and a proposed 20-day suspension on July 12, 2017.

DCR/AA also maintains that it was inappropriate for J.E. to question Y.N.'s motives in going to DCR/AA based on any protected category of which Y.N. is a member. As he is a supervisor, J.E. has a responsibility under the State Policy to ensure that all possible violations are immediately brought to DCR/AA's attention so that they can be promptly addressed. DCR/AA states that J.E. should not have questioned Y.N.'s rationality or motive for contacting DCR/AA.

Reply of Complainant Y.N.

In reply, Y.N. argues that DCR/AA's response was untimely as it was submitted more than 20 days after its receipt of his appeal. He argues that the attempt at mediation does not excuse the delay in the completion of the investigation. With respect to the merits, Y.N. denies that he ever misrepresented himself and states he was never removed from the EEO Advisory Committee for misrepresentation. He also reiterates his disagreement with DCR/AA's determination. In support, Y.N. submits various documents, including e-mail correspondence.

Reply of Respondent J.E.

In reply, J.E. argues that DCR/AA has misinterpreted the State Policy, which does not indicate that it is improper to question an employee regarding going to DCR/AA because of a protected category, and confused its interpretation of an inappropriate inquiry with a demeaning reference. As to the issue of retaliation, J.E. maintains that Y.N. misrepresented himself, and G.R. contacted Legge before she met with Y.N. on July 19, 2016. It was only after G.R. received Legge's e-mail of that same date did the "pre-disciplinary" counseling meeting occur. As such, J.E. emphasizes that DCR/AA is mistaken in its assertion that *he* commenced recommendations for *progressive discipline* against Y.N. for engaging in a protected activity. He stresses that it was *not* his decision to act, and it was not progressive discipline. J.E. states that he drafted the counseling memo at G.R.'s request. He states that the counseling memo, which was the beginning of a "more formal process," was placed in an unofficial file for the purpose of demonstrating and reminding G.R. that Y.N. had received counseling in case there were any future acts that required discipline.

It is noted that G.R. did not file a reply.

CONCLUSION

Initially, Y.N. requests a hearing. Discrimination appeals are treated as reviews of the written record. *See N.J.S.A. 11A:2-6b*. Hearings are granted in those limited instances where the Commission determines that a material and controlling dispute of fact exists that can only be resolved through a hearing. *See N.J.A.C.*

4A:2-1.1(d). For the reasons explained below, no material issue of disputed fact has been presented that would require a hearing. *See Belleville v. Department of Civil Service*, 155 *N.J. Super.* 517 (App. Div. 1978).

It is noted that Y.N. contends that DCR/AA provided an untimely response. However, there is no jurisdictional statutory timeline within which a party is required to respond to an appeal. *See e.g., In the Matter of Michael Compton* (MSB, decided May 18, 2005). In addition, in order for the Commission to make a reasoned decision in a matter, it must review a complete record. *See e.g., In the Matter of James Burke* (MSB, decided June 22, 2005). Moreover, Y.N. had the opportunity to reply. As such, there is no basis to disregard DCR/AA's response.

Y.N. complains that Transportation's determinations, issued August 30, 2017, were untimely. Y.N. states that the determinations were issued well after 120 days from his August 3, 2016 filing of the complaint plus time extensions. *N.J.A.C.* 4A:7-3.2(l)2 provides that the investigation of a complaint shall be completed and a final letter of determination shall be issued no later than 120 days after the initial intake of the complaint. Additionally, *N.J.A.C.* 4A:7-3.2(l)3 states that the time for completion of the investigation and issuance of the final letter of determination may be extended by the State agency head for up to 60 additional days in cases involving exceptional circumstances. The State agency head shall provide the Division of Equal Employment Opportunity/Affirmative Action and all parties with written notice of any extension and shall include in the notice an explanation of the exceptional circumstances supporting the extension. In the present case, DCR/AA explains that it began a preliminary investigation and attempted mediation before determining to conduct a formal investigation on or about January 13, 2017. DCR/AA also states that it received numerous e-mails from Y.N., many of which raised new allegations, and that it was obligated to review all new allegations. However, the State Policy sets 180 days after the initial intake of the complaint as the maximum amount of time permitted for the completion of the investigation and issuance of the determination. Further, mediation may be undertaken as a remedial action after an investigation has been completed and a violation has been substantiated. *See N.J.A.C.* 4A:7-3.1(g). While the Commission acknowledges DCR/AA's attention to its obligation to review Y.N.'s e-mails, it is reminded that it must comply with the regulatory directives. If it fails to do so in the future and egregious violations occur, it may be subject to fines and penalties pursuant to *N.J.A.C.* 4A:10-2.1(a)2. Nonetheless, as further explained below, the Commission finds that a thorough investigation was conducted.

With respect to the merits of these appeals, it is a violation of the State Policy to engage in any employment practice or procedure that treats an individual less favorably based upon any of the protected categories. *See N.J.A.C.* 4A:7-3.1(a)3. The protected categories include race, creed, color, national origin, nationality, ancestry, age, sex/gender (including pregnancy), marital status, civil union status,

domestic partnership status, familial status, religion, affectional or sexual orientation, gender identity or expression, atypical hereditary cellular or blood trait, genetic information, liability for service in the Armed Forces of the United States, or disability. *See N.J.A.C. 4A:7-3.1(a)*. It is a violation of this policy to use derogatory or demeaning references regarding a person's race, gender, age, religion, disability, affectional or sexual orientation, ethnic background, or any other protected category. A violation of this policy can occur even if there was no intent on the part of an individual to harass or demean another. *See N.J.A.C. 4A:7-3.1(b)*. Additionally, retaliation against any employee who alleges that she or he was the victim of discrimination/harassment, provides information in the course of an investigation into claims of discrimination/harassment in the workplace, or opposes a discriminatory practice, is prohibited by this policy. No employee bringing a complaint, providing information for an investigation, or testifying in any proceeding under this policy shall be subjected to adverse employment consequences based upon such involvement or be the subject of other retaliation. *See N.J.A.C. 4A:7-3.1(h)*. The State Policy is a zero tolerance policy. *See N.J.A.C. 4A:7-3.1(a)*.

N.J.A.C. 4A:7-3.1(e) provides that supervisors shall make every effort to maintain a work environment that is free from any form of prohibited discrimination/harassment. Supervisors shall immediately refer allegations of prohibited discrimination/harassment to the State agency's Equal Employment Opportunity/Affirmative Action Officer, or any other individual designated by the State agency to receive complaints of workplace discrimination/harassment. A supervisor's failure to comply with these requirements may result in administrative and/or disciplinary action, up to and including termination of employment. For purposes of this section and *N.J.A.C. 4A:7-3.2*, a supervisor is defined broadly to include any manager or other individual who has authority to control the work environment of any other staff member (for example, a project leader).

Moreover, the appellant shall have the burden of proof in all discrimination appeals. *See N.J.A.C. 4A:7-3.2(m)4*.

The Commission has conducted a review of the record and finds that an adequate investigation was conducted and that the relevant parties were interviewed. DCR/AA appropriately analyzed the available documents and interviewed several witnesses in investigating Y.N.'s complaint and concluded that his allegations of being subjected to violations of the State Policy were substantiated in part.

The record reflects that J.E. asked Y.N., "Are you going to [DCR/AA] because you are black?" at the August 2, 2016 meeting. The Commission agrees that it was inappropriate for J.E. to question Y.N.'s motives in going to DCR/AA based on any protected category of which Y.N. is a member. Once Y.N. expressed his intention to file a complaint with DCR/AA, J.E. should not have asked any questions concerning

Y.N.'s intent or thought process. Rather, J.E. was required to refer the matter to DCR/AA for its investigation. Attempting to question Y.N. as to why he was going to file a complaint could have improperly given the impression that J.E. was attempting to convince Y.N. *not* to file a complaint. Such an impression would be at odds with the State Policy, which *encourages* the reporting of alleged workplace discrimination and commits the State to providing a work environment free from prohibited discrimination or harassment. *See N.J.A.C. 4A:7-3.1.* As such, DCR/AA appropriately found J.E.'s question to be a State Policy violation.

The Commission also finds that DCR/AA appropriately determined that Y.N.'s allegations of retaliation were substantiated in part. Y.N. engaged in protected activity when he met with G.R. and J.E. to report alleged discrimination against S.O., regardless of whether Y.N. had S.O.'s consent to do so. *See N.J.A.C. 4A:7-3.2(a)* ("All employees and applicants for employment have the right and are encouraged to immediately report suspected violations of the State Policy Prohibiting Discrimination in the Workplace, *N.J.A.C. 4A:7-3.1.*"); *N.J.A.C. 4A:7-3.2(b)* ("Complaints of prohibited discrimination/harassment can be reported to either . . . the [Equal Employment Opportunity/Affirmative Action] Officer, or to any supervisory employee of the State agency. Complaints may also be reported to [an authorized designee]."). As J.E. notes in his appeal, Y.N. was brought into the room partly because Y.N. wanted to meet with them, and Y.N. "wanted to talk about discrimination against [S.O.]" It was only after Y.N. engaged in this protected activity that G.R. and J.E. issued the August 2, 2016 counseling memo, described by J.E. as the beginning of a "more formal process" and incorporated into their February 2017 request for discipline. The memo stated that the "primary" situation that prompted the counseling was Y.N.'s misrepresentation on more than one occasion of his role as a union representative or EEO Advisory Committee member. However, the investigation revealed that G.R. and J.E. failed to provide any other instances of Y.N.'s alleged misrepresentation and only identified the one incident involving S.O. wherein Y.N. engaged in protected activity. As such, in this particular case, any misrepresentation on Y.N.'s part cannot be regarded as unrelated to a protected activity. Moreover, while the counseling memo referenced earlier insubordinate behavior, the investigation revealed that the earlier incidents were not specifically documented at the time they occurred and prior to Y.N. engaging in protected activity. J.E. acknowledges on appeal that he attempted to handle these incidents informally. In one of these incidents, according to J.E., Y.N. stated that he would "never work for a woman." This alleged statement is a demeaning gender-based comment. However, it appears from the record that J.E. did not report this incident as a suspected State Policy violation to DCR/AA or an authorized designee. Therefore, it is appropriate to refer to DCR/AA the matter of J.E.'s failure to report this incident so that it can initiate an investigation and, if warranted, take appropriate action against J.E. in accordance with *N.J.A.C. 4A:7-3.1(k).*

Both G.R. and J.E. note on appeal that counseling, in itself, is not discipline. Nevertheless, the counseling memo at issue here expressed concerns over Y.N.'s workplace behavior and was, as already stated, the beginning of a "more formal process" according to J.E. J.E. notes that the counseling memo was placed in a file to remind G.R. that Y.N. had received the counseling should there be future acts requiring discipline. In other words, the counseling memo was to be a factor that informed potential future disciplinary actions against Y.N., and, as such, it was a corrective action taken consistent with the concept of progressive discipline. Thus, in this case, the counseling memo represented an adverse employment consequence within the meaning of *N.J.A.C.* 4A:7-3.1(h). This finding is bolstered by the fact that the counseling memo was still issued even after Legge had already discussed with Y.N. the difference between his role on the EEO Advisory Committee and the role of staff in the DCR/AA Internal EEO Unit. In addition, while J.E. contends that he was only the drafter of the memo, the memo itself indicates that it was from both G.R. and J.E. Under the foregoing circumstances, the Commission is satisfied that DCR/AA properly found the timing of G.R. and J.E.'s actions, though ostensibly concerned with misrepresentation, to be suspect and demonstrative of retaliation for the associated protected activity of reporting an allegation of discrimination.

Finally, the Commission agrees that DCR/AA appropriately determined that all of Y.N.'s remaining allegations were either unsubstantiated as State Policy violations or would be addressed in a separate investigation. The documentation Y.N. submits on appeal provides no reason to question those findings. Accordingly, the investigation was thorough and impartial, and no substantive basis to disturb DCR/AA's determinations has been presented.

ORDER

Therefore, it is ordered that these appeals be denied. It is further ordered that the matter of J.E.'s failure to report a suspected State Policy violation be referred to DCR/AA for further investigation consistent with this decision.

This is the final administrative determination in these matters. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 4TH DAY OF APRIL, 2018



Deirdre L. Webster Cobb
Acting Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Written Record Appeals Unit
Civil Service Commission
P.O. Box 312
Trenton, New Jersey 08625-0312

c. Y.N. (2018-766)
G.R. (2018-873)
J.E. (2018-866)
Linda Legge
Mamta Patel
Records Center